



**CITY OF LODI  
COUNCIL COMMUNICATION**

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**AGENDA TITLE:** Ordinance No. 1738 entitled, "An Ordinance of the City Council of the City of Lodi Amending Title 8 – Health and Safety – Chapter 8.24, Comprehensive Municipal Environmental Response and Liability, by Repealing and Reenacting Section 8.24.010 – 'Definitions,' Subsection '2,' and 8.24.040 – 'Liability,' Subsection 'F,' to the Lodi Municipal Code Relating to Abatement Action Cost and Recovery Issues"

**MEETING DATE:** January 7, 2004

**PREPARED BY:** City Clerk

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**RECOMMENDED ACTION:** Following reading by title, it would be appropriate for the City Council to adopt the attached Ordinance No. 1738.

**BACKGROUND INFORMATION:** Ordinance No. 1738 entitled, "An Ordinance of the City Council of the City of Lodi Amending Title 8 – Health and Safety – Chapter 8.24, Comprehensive Municipal Environmental Response and Liability, by Repealing and Reenacting Section 8.24.010 – 'Definitions,' Subsection '2,' and 8.24.040 – 'Liability,' Subsection 'F,' to the Lodi Municipal Code Relating to Abatement Action Cost and Recovery Issues" was introduced at the regular City Council meeting of December 17, 2003.

Pursuant to state statute, an ordinance may be adopted five days after its introduction following reading by title.

This ordinance has been approved as to form by the City Attorney.

**FUNDING:** None required.

A handwritten signature in black ink, appearing to read "Susan J. Blackston".

Susan J. Blackston  
City Clerk

SJB/JMP

Attachment

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**APPROVED:**

A handwritten signature in black ink, appearing to read "H. Dixon Flynn".  
H. Dixon Flynn, City Manager

ORDINANCE NO. 1738

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI AMENDING  
TITLE 8 – HEALTH AND SAFETY – CHAPTER 8.24, COMPREHENSIVE  
MUNICIPAL ENVIRONMENTAL RESPONSE AND LIABILITY, BY REPEALING  
AND REENACTING SECTION 8.24.010 – “DEFINITIONS,” SUBSECTION “2,” AND  
8.24.040 - “LIABILITY,” SUBSECTION “F,” TO THE LODI MUNICIPAL CODE  
RELATING TO ABATEMENT ACTION COST AND RECOVERY ISSUES

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BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

**SECTION 1.** Section 8.24.010 “Definitions” Subsection “2” of the Lodi Municipal Code is hereby repealed and reenacted to read as follows:

2. The term “abatement action costs” means:

A. at or in connection with any site (or any separate subdivision or area within a site) at which the city is not liable under 42 U.S.C. § 9607 for the costs of response to site conditions resulting in whole or in part from the release or threatened release of hazardous substances to which the city has responded or is responding under this chapter, any and all legal, technical, or administrative fees and costs, and interest and other costs of financing incurred by the city in performing or preparing to perform an abatement action in compliance with the requirements of this chapter. The term “abatement action costs” shall specifically include, but shall not be limited to, any and all of the following costs incurred by the city:

i. to retain expert assistance in health, law, engineering, and environmental science, expert witness services and legal fees and reasonable costs of litigation (including, but not limited to, internal costs of the city attorney's office or outside legal counsel deemed necessary at the sole discretion of the city to effectively respond to conditions at and emanating from the site) to study, investigate, abate, remove, remediate, or respond to an actual or threatened environmental nuisance or any endangerment to the public health, welfare, or the environment that may be presented by an actual or threatened environmental nuisance;

ii. to investigate or respond to the existence, or threat of an environmental nuisance;

iii. to monitor, assess, or evaluate an environmental nuisance or any endangerment to the public health, welfare, or the environment that may be presented by an actual or threatened environmental nuisance;

iv. to prevent, minimize, or mitigate an environmental nuisance or any endangerment to the public health, welfare, or the environment that may be presented by an actual or threatened environmental nuisance;

v. to oversee and monitor the performance by any responsible party of any investigation or abatement action in response to a condition which is or may be an environmental nuisance;

vi. to review, comment on, or revise a responsible party's plans and proposals submitted pursuant to Section 8.24.050(E) or to oversee and monitor the performance by any responsible party of any of the monitoring and testing activities which may be required pursuant to Section 8.24.050(E);

vii. to prepare for or undertake necessary enforcement activity authorized by this Chapter 8.24, including the recovery of abatement action costs incurred or to be incurred by the city or any injunctive relief authorized by this chapter to respond to an environmental nuisance, including enforcement activity deemed necessary by the city to obtain information and site access authorized by this chapter; and

viii. costs of investigation and evaluation, as authorized by the city council, of such financing, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to comprehensive municipal environmental response fund or any sub-fund of the comprehensive municipal environmental response fund created by the city council as authorized by Section 8.24.070(A), as may be necessary and proper to accomplish the purposes set forth in this chapter; and

ix. costs of issuing, servicing, and retiring of any financing instruments authorized by the city council as provided in Section 8.24.070, with recourse to the maximum extent available solely against the present and future assets and recoveries pledged to the comprehensive municipal environmental response fund or any sub-fund of the comprehensive municipal environmental response fund created by the city council as authorized by Section 8.24.070(A); and

B. At or in connection with any site (or any separate subdivision or area within a site) to which the city has responded or is responding under this chapter, and at which the city is liable under 42 U.S.C. § 9607 for the costs of response to site conditions resulting in whole or in part from the release or threatened release of hazardous substances, all such fees and costs included within the definition set forth in subsection 2(a) of this Section 8.24.010, except that such term shall not for purposes of this chapter include, at or in connection with any site (or any separate subdivision or area within a site) to which this subsection 2(b) applies, any attorneys fees and costs, expert witness fees and costs or other litigation costs incurred or to be incurred by the city in the preparation or conduct of any litigation to recover abatement action costs pursuant to this chapter, or to secure judicial abatement of an environmental nuisance pursuant to this chapter.

C. Notwithstanding the provisions of subparagraphs (a) and (b) of this subsection 2, the term shall not include any costs incurred to compel compliance with an information demand issued pursuant to Section 8.24.050(B) of this chapter prior to the entry of a judicial order upholding that information demand, in whole or in part.

**SECTION 2.** Section 8.24.040 - "Liability" Subsection "F" of the Lodi Municipal Code is hereby repealed and reenacted to read as follows:

**F. Recovery of Attorneys Fees By Prevailing Party Pursuant to California Government Code Section 38773.5.**

1. Reasonable litigation expenses, including attorneys and expert witness fees and costs, and litigation costs may be recovered by the prevailing party in any action or administrative proceeding brought or continued in whole or in part pursuant to this chapter by the city attorney:

a. to recover abatement action costs incurred and to be incurred by the City of Lodi;

b. to secure or compel compliance with an Abatement Action Order issued pursuant to this chapter, to enforce an information demand, or an access, inspection or monitoring order, following a judicial order upholding the demand or order in whole or in part; or

c. to secure abatement of an actual or threatened endangerment to the public health, welfare, or the environment arising out of, in whole or in part, an actual or threatened environmental nuisance.

2. Notwithstanding Paragraph 1 of this Subsection F, the recovery of such fees and costs, including attorneys' fees, by the prevailing party is strictly limited to those individual actions or a proceeding in which the city elects, at the initiation of that individual action or proceeding, to seek recovery of its own attorneys' fees.

**SECTION 3.** All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

**SECTION 4.** No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

**SECTION 5.** Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.

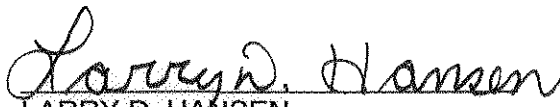
**SECTION 6.** Effect of On-going Actions. The effect of this Ordinance upon preceding or on-going actions or proceedings shall be determined in accord with the following provisions of this section 6:

(A) Notwithstanding the repeal of Section 8.24.010(2) and Section 8.24.040(F) of Title 8 of the Health and Safety Code by operation of sections 1 and 2 of this Act, any action taken pursuant to those Subsections shall remain in effect, and be subject to Chapter 8.24 (commencing with Section 8.24.010) of Title 8 of the Health and Safety Code, as including the subsections reenacted by section 1 of this Act.

(B) The repeal and reenactment of Section 8.24.010(2) and Section 8.24.040(F) of Title 8 of the Health and Safety Code by sections 1 and 2 of this Act shall not terminate, affect, or modify any proceeding, order, or agreement issued or entered into by the City, or any officer or employee of the City pursuant to Chapter 8.24, or any rights or obligations arising out of or pursuant to those provisions, and notwithstanding the effective date of this act, the provisions of Chapter 8.24 (commencing with Section 8.24.010) of Title 8 of the Health and Safety Code, as including the subsections reenacted by sections 1 and 2 of this Act, shall apply retroactively to those proceedings, orders, or agreements.

**SECTION 7.** This ordinance shall be published one time in the "Lodi News-Sentinel," a daily newspaper of general circulation printed and published in the City of Lodi and shall take effect thirty days from and after its passage and approval.

Approved this 7<sup>th</sup> day of January, 2004

  
LARRY D. HANSEN  
Mayor

Attest:

  
SUSAN J. BLACKSTON  
City Clerk

State of California  
County of San Joaquin, ss.

I, Susan J. Blackston, City Clerk of the City of Lodi, do hereby certify that Ordinance No. 1738 was introduced at a regular meeting of the City Council of the City of Lodi held December 3, 2003, and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held January 7, 2004, by the following vote:

AYES: COUNCIL MEMBERS – Beckman, Howard, and Land

NOES: COUNCIL MEMBERS – Hitchcock and Mayor Hansen

ABSENT: COUNCIL MEMBERS – None

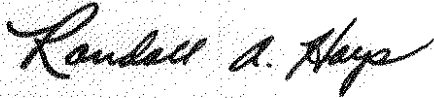
ABSTAIN: COUNCIL MEMBERS – None

I further certify that Ordinance No. 1738 was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.



SUSAN J. BLACKSTON  
City Clerk

Approved as to Form:



RANDALL A. HAYS  
City Attorney

**Jennifer Perrin**

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**From:** Ron Bernasconi [Ron@BernasconiCommercial.com]  
**Sent:** Wednesday, January 07, 2004 4:45 PM  
**To:** Susan Blackston; Susan Hitchcock; Emily Howard; Keith Land; John Beckman; Larry Hansen  
**Subject:** We need independent legal advise before we make any changes to MERLO or our Contract with Envision

Honorable City Council Members,

I am very concerned by the actions recently taken in closed session and would have appeared before the Council tonight. However, I have to run a practice tonight and therefore request that the City Clerk file the following as my public testimony at tonight's regular meeting of the Lodi City Council.

In 1999 City Attorneys Michael Donovan and Randy Hays expressed no doubt that **the city would more than recover all expenses incurred when we relied upon their advise to borrow \$16 million dollars from Lehman Brothers at 20 to 30%.**

In fact City Attorney Hays told the Sacramento Bee, "**The way the laws are designed, we can't lose,**"

Then on December 24, 2003 the Sacramento Bee reported that a, "Court ruling may put Lodi on the spot for millions" after Judge Damrell ruled that portions of the city's cleanup ordinance known as MERLO conflicted with federal law and was unconstitutional.

As a result, Lodi cannot recover the \$22.5 million it spent in legal fees or the \$7.5 million in interest financing Envision's ill-conceived legal strategy.

In his 40 page ruling Damrell removed the portions of MERLO that were unconstitutional **and approved the remainder of the ordinance.**

Now our City Attorneys are asking the Council to consider new additions to MERLO, which would be ill-advised without an independent legal review.

Frankly, 11th hour additions to MERLO on the eve of trial may further anger the Judge if they are viewed as attempts to circumvent his recent ruling.

Another potential threat to our City emanates from the plan to renegotiate our contract with Envision.

Now, we would all love to have Envision slash its fees, but can we trust them not to slip in clauses that elevates their interests above those of the City?

We should be able to rely on our City Attorney. However, Randy Hays has proven to be nothing more than a rubber stamp to anything Donovan presents and it would be foolish to believe that any member of the City Council can negotiate contract language with an attorney(s) without independent counsel to protect the City's interests. As the saying goes, "**Those who act as their own attorney have a fool for a client.**"

1/8/2004

Moreover, renegotiating our contract with Envision after the Court's recent rebuke of our legal strategy not only makes the City look weak and stupid; **it may undermine the City's ability to proceed against Envision for malpractice**, which may be our only way out of this debacle.

Apparently, 4 Council members believe it would be too expensive to hire another outside attorney because even though Envision's fees are accruing at an alarming rate, Envision is collecting only what they can squeeze out of our insurer, USF&G.

Ironically, this is how it should have been from the start. Having to be accountable to USF&G would have stemmed the over billing that occurred while Hays was asleep at the switch as Envision burned through the \$16 million dollar Lehman Loan before they even got to trial.

Now after spending close to \$30 million dollars on a lawsuit that is basically being thrown out of court on the eve of trial, it should be painfully apparent to everyone that there is nothing more expensive than bad legal advise and that failing to secure independent legal counsel would be a false economy.

Why doesn't the City use the firm it has already retained to review Envision's Legal Bills especially since that expenditure has already paid for itself.

Clearly, we need independent legal counsel to deal with Hays and Envision. **This what Redding did when they suspected Hays of malfeasance.**

Accordingly, I respectfully request that the City Council;

- 1) Secure independent legal counsel to review, the conduct of our City Attorney(s) and make sure any contract with Envision requires Envision to maintain Lawyer's professional liability insurance to protect the city from Envision's errors and omissions.
- 2) Secure independent legal counsel to review any changes to the City's Contract with Envision. I am also making a public records request for the City's current contract with Envision and I am requesting a copy of the proposed replacement contract with Envision at least 5 days prior to any vote by the City Council to approve the replacement contract.
- 3) Table any changes to MERLO until you have secured independent legal counsel to review and approve our Attorneys' proposed changes to MERLO.

Thank you for your consideration,

Ron Bernasconi

## **Court ruling may put Lodi on the spot for millions**

**By Cameron Jahn -- Bee Staff Writer**

***Published 2:15 a.m. PST Wednesday, December 24, 2003***

Two key Lodi city officials reacted in shock Tuesday to a federal judge's ruling that they say guts the city's high-stakes toxic cleanup lawsuit, leaving the taxpayers potentially liable for millions of dollars in legal costs.

U.S. District Judge Frank C. Damrell Jr. on Monday ruled that the city's cleanup ordinance conflicts with federal law and is unconstitutional.

Damrell said the city's legal strategy -- winning money from insurance carriers of polluting businesses -- is set up to benefit attorneys and investors rather than speed up environmental cleanups as Congress intended.

As a result, Lodi cannot recover the estimated \$22.3 million it has spent in legal expenses since 1996 or the more than \$7.5 million in interest costs on financing those expenses.

The city has invested \$6.3 million of its own money in lawsuits against several downtown businesses and their insurers. The balance of \$16 million spent on legal outlays was borrowed at credit-card interest rates from the investment banking firm Lehman Brothers of New York.

Lawyers for the city had pitched the loan as a no-risk way of financing a legal battle it otherwise could not afford. They said Lehman would be repaid only from insurance money won in settlements or judgments.

Some city officials now believe Lehman is not going to walk away from the loan and will try to recover the money from the city.

Lodi, with a population of 59,000, has an annual budget of about \$29 million.

"The way it appears to me, everything we've worked on for the last eight years has been thrown out," Councilwoman Susan Hitchcock said. "The people who are losing are the citizens of Lodi."

Lori Gualco, lead attorney for Guild Cleaners, one of the defendants, called the judge's ruling "the death knell -- it's all over for the city, basically."

But Michael Donovan, the head of the city's legal team, disputed Damrell's ruling. He said Monday's decision would not be a significant setback.

"I would say that the strategy is sound," Donovan said. "The trial judge has given us his opinion, and it's far from the final judgment on the matter."

The 40-page ruling was Damrell's harshest yet in the city's 3-year-old suit to compel dry cleaners and other businesses to remove industrial solvents that tainted an estimated 600 acres in the central business district.



In his ruling this week, Damrell granted two insurance companies, Fireman's Fund and Unigard, a permanent injunction preventing Lodi from enforcing a cleanup ordinance the city enacted in 1997.

Damrell agreed with an appellate court that said Lodi can't legislate its way out of liability in the cleanup because the city also is partly responsible for the contamination: The city's leaky sewer system may have allowed the pollutants to seep into the ground.

He also said the ordinance is the polar opposite of what Congress intended decades ago when it passed the federal toxic cleanup act, known as the Superfund law.

The law allows for limited cost recovery in cleanups but not "an opportunity to profit at the expense of the environment," Damrell said.

Lodi's ordinance compels businesses found responsible for the pollution to pay not only the cost of the cleanup but also to reimburse the city for all its legal and financial costs in bringing enforcement action.

The city's "cost recovery scheme generates the opportunity for a financial windfall for some few fortunate professionals, as well as Lehman Brothers, Inc., an investment bank, which has no interest in cleaning up the contaminated site," Damrell said.

The judge said Lodi's attorneys "have often produced unnecessarily voluminous or redundant filings and imaginative ploys that have sent this litigation needlessly down paths." That means "important remediation efforts have been brought to a grinding halt."

Lodi has a Jan. 12 trial date before Damrell, but some city officials now wonder whether to risk trial.

"It's as if the judge said, 'We've given you enough clues along the way but you haven't followed them, and we're telling you once and for all don't go this route because you'll be wasting your money,' " Hitchcock said.

The Lodi City Council will meet in closed session Dec. 30 to decide what to do.

Lodi Mayor Larry Hansen said the city is now in "limbo," suspicious of its expensive legal team and their risky strategy yet entirely reliant on those lawyers for advice.

"I try not to have knee-jerk reactions, but their credibility is definitely in question," he said. "I feel like we're losing control of the strategy."

Lodi cannot fire Donovan without consent of the Lehman Brothers investors, who remain anonymous.

Meanwhile, the city has launched an audit of Donovan's bills, which total more than \$14 million.

Hitchcock on Tuesday said she had already heard from a number of Lodi residents outraged by the city's legal quandary and looking to point fingers.

"This is really a travesty of poor management and poor leadership," she said. "I definitely think the public will hold people accountable" at the ballot box.